IN THE

Supreme Court of the United States

OCTOBER TERM, 1960

No. 720

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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FANDERLIK-LOCKE CO., a corporation, and GREAT AMERICAN INDEMNITY COMPANY, *Petitioners*,

v.

UNITED STATES OF AMERICA, for the use of M. B. Morgan, doing business, as M. B. MORGAN PAINTING CONTRACTOR; and NEW AMSTERDAM CASUALTY COMPANY, *Respondents*.

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

The Respondents have no objection to the portions of the petition entitled "Opinions Below" and "Jurisdiction". The Respondents are dissatisfied with the Petitioners' "Questions Presented", "Statutes", "Statement of the Case" and "Reasons for allowance of the Writ".

QUESTIONS PRESENTED

The sole question presented by the petition is whether this Court will review a case in which the only issue is whether the Court of Appeals for the Tenth Circuit correctly interpreted the inter-relation of two contracts. The two questions presented by Petitioners ignore the opinion of the Court of Appeals, which was based solely on the interpretation of the contracts.

STATUTES

Since this is a Miller Act case, the provisions of that statute are relevant. However, because of the contractual interpretation basis of the decision of the Court below, the provisions of 68 Stat. 81 (1954), 41 U.S.C. 321, 322, are in no way relevant to this case.

STATEMENT OF THE CASE

Respondents object to Petitioners' Statement of the Case in that it is composed in major part of arguments and of allegations unsupported by any facts.

Petitioners attempt to convey the impression that the subcontractor respondent was a party to the claim filed by the prime contractor with the Air Force contracting officer and with the Board of Contract Appeals. This is simply not so, and, in fact, respondent was specifically denied the right to have any standing before the Board of Contract Appeals by the Board itself.

Petitioners state on Page 5 of the Petition that the subcontract did not expressly contain a disputes clause. We call the attention of the Court to the portion of the opinion of the Court of Appeals for the Tenth Circuit shown on page 6, footnote 3 of Appendix A

to the Petition. This footnote shows that the subcontract had a provision on arbitration diametrically opposed to the standard disputes clause found in paragraph 6 of the "General Provisions" of the prime contract.

Petitioners, in setting out what they determined to be relevant provisions of the two contracts, failed to point out the distinction relied on by the Tenth Circuit between the phrase "General Conditions", used in the subcontract, and the phrase "General Provisions", used in the prime contract. The "General Conditions" of the subcontract referred specifically to "The General Conditions of the Contract for the Construction of Buildings", A.I.A. form A-2 (Rev. 9-1-51), and such general conditions were neither attached to nor incorporated in the prime contract. The disputes clause quoted on Page 4 of the Petition was one of the "General Provisions" of the prime contract, and such "General Provisions" were at no time incorporated by reference or otherwise into the subcontract.

Petitioners erroneously state the position of Respondents. This position has been and still is that the subcontractor by his subcontract did not agree to be bound by the disputes clause contained in the "General Provisions" of the prime contract. The position of Respondents was specifically adopted by the Court of Appeals for the Tenth Circuit in its Opinion.

Petitioners, while disclaiming any intention to discuss the merits, do so on pages 6 and 7 of the Petition. The Trial Court and the Court of Appeals for the Tenth Circuit both found for Respondents on the merits, and findings were specifically made and affirmed

that the $110,000.00 awarded Respondents covered bona fide extras which were ordered by the prime contractor. See, *e.g.*, Findings of Fact of the Court numbered 6 through 13 (R. 37-39). Petitioners' arguments on the merits are groundless in the light of the uncontested findings made by the Courts below.

REASONS FOR ALLOWANCE OF THE WRIT

Although the Court of Appeals for the Tenth Circuit carefully limited its holding to an interpretation of the two contracts involved, Petitioners carefully avoid meeting this issue in stating their reasons for allowance of the Writ. The only remotely possible reason for the allowance of a Writ in this case would be one based on an attack on the contractual interpretations made by the Courts below. This reason, however, vanishes readily when the opinion of the Court is examined in conjunction with the two contracts involved.

ARGUMENT

POINT I. THE COURT OF APPEALS FOR THE TENTH CIRCUIT DECIDED THIS CASE ON THE BASIS OF THE INTERPRETATION OF THE CONTRACTS INVOLVED, NOT ON ANY QUESTION OF EXHAUSTION OF ADMINISTRATIVE REMEDY.

Petitioners commence their first point by stating that the Miller Act was erroneously interpreted by the Court below, and then proceed to give a history and outline of the Miller Act and a lengthy historical review of defense contracts, "Dispute Clauses" and The Board of Contract Appeals. The statement with regard to the Miller Act is not true, since the Court below did not interpret the Miller Act but rather the two contracts involved in the case. The history developed by Petitioners is interesting, but completely irrelevant to any issue before this Court.

The conclusions of the Court of Appeals for the Tenth Circuit on the only true issue involved in this case before this Court are found in the following quotations from the Opinion of the Court:

> "It is contended that by these references, Section 6 of the general provisions of the prime contract was incorporated in the subcontract, and that a suit under the Miller Act cannot be maintained by the subcontractor until there is a final determination of the claims submitted under Section 6. While we express no opinion as to the right of the parties to enter into an agreement which might circumvent the Miller Act, we hold that it was not the intention of the parties to the subcontract that the subcontractor was required to comply with the provisions of Section 6 before it could maintain an action under the Miller Act." Petition, Appendix A, p. 4.

> "An agreement should not be construed to bring about such a result unless it be 'manifest by plain language' of the contract. *United States* v. *Moorman*, 338 U.S. 457, 462; *Mercantile Trust Co.* v. *Hensey*, 205 U.S. 298, 309. The language of the subcontract manifests no such intention. The subcontract references are to the 'general conditions' of the prime contract not the 'general provisions,' and they relate generally to performance of the subcontract according to the specifications, not to the settlement of disputes, or the subcontractor's right to sue under the Miller Act." Petition, Appendix A, p. 6.

Petitioners have not shown wherein either of these quotations are erroneous, or did any violence to the doctrine of the exhaustion of administrative remedies; and absent such a showing, Petitioners' first point has absolutely no merit.

POINT II. THE COURT OF APPEALS FOR THE TENTH CIRCUIT CORRECTLY INTERPRETED THE CONTRACTS INVOLVED.

Petitioners mount a two-pronged attack on the interpretation of the contracts involved made by the Court below. The first involves the use of various quotations from this Court and other authorities setting out broad rules of contractual interpretation, while the second involves the use of the doctrine that the constructions of the instrument by the parties are governing when the instrument is ambiguous. Petitioners at no point attack the true basis on which the Court below reached its decision; to-wit, that the terms "general conditions" and "general provisions" do not mean the same thing. The reason for this absence for attack, we believe, is that logically and legally the decision of the Court below is absolutely correct and cannot be attacked.

With regard to the two theories relied on by Petitioners the first, dealing with general rules of construction, fails to prove anything since the general rules are never related to the contracts in question. The second theory is based on the erroneous premise that the evidence showed that the Subcontractor Respondent took some action to be bound by the disputes clause of the prime contract. For instance, Petitioners, on page 18, state that they, meaning the contractor and the subcontractor, appealed to the Board of Contract Appeals. This is not true. The prime contractor took the appeal and the subcontractor was informed by the Board that he had no standing whatever before it. Being thus based on an erroneous premise, Petitioners' second theory must fail.

Petitioners also state that this case is essentially a dispute between the government and the subcontractor

over the performance of the paint job. This is not so for two reasons. First, the subcontractor had absolutely no contractual relationship with the government. Second, and most important, every action taken by the subcontractor was on the orders of the prime contractor, not the orders of the government; and the subcontractor at all times was looking to the prime contractor for payment. Findings of Fact of the Court (R. 37-39).

This Court has made it clear that the intention of the parties to submit their contractual disputes to final determination outside the Courts should be made manifest by plain language. *Mercantile Trust Co.* v. *Hensey*, 205 U.S. 298, 309; 51 L. ed. 811, 816 (1907); *United States* v. *Moorman*, 338 U.S. 457, 462; 94 L. ed. 256, 260 (1950). We submit that the Court of Appeals for the Tenth Circuit followed these decisions and interpreted the two contracts involved in the only permissible way in the light of the use of the words "general provisions" in the prime contract and the use of the words "general conditions" in the subcontract. Thus, Petitioners' point two is without merit.

POINT III. THERE IS NO CONFLICT BETWEEN THE DECISION OF THE COURT BELOW AND DECISIONS REACHED BY THE COURTS OF OTHER CIRCUITS.

Petitioners cite five cases as purportedly showing a split of authority among the circuits. These cases do no such thing. In *United States* v. *Bruce*, 272 F. 2d 62, 64 (5th Cir. 1959), the Court accepted the argument of the subcontractor that the subcontract embraced the guaranty provisions of the prime contract between the government and the prime contractor. This apparently was conceded by the prime contractor and was not an issue in the case. In *United States*

v. *George*, 243 F. 2d 83, 86 (5th Cir. 1957), again there was no apparent disagreement between the parties that the subcontract incorporated by reference all the provisions of the prime contract, including the disputes clause. In *United States* v. *Morley Construction Co.*, 98 F. 2d 781 (2nd Cir. 1938), the subcontract contained specific language incorporating the portion of the prime contract in question, and again neither party contended that such incorporation by reference did not exist. In *Ross Engineering Co.* v. *Pace*, 153 F. 2d 35, 41 (4th Cir. 1946), the Fourth Circuit was called upon to decide if a reference in the subcontract to the prime contract on a certain issue overcame a specific clause in the subcontract on the same issue. The court ruled that the specific clause governed, which is consistent, rather than inconsistent, with the opinion of the Court below in the instant case. In *United States* v. *Henke Construction Co.*, 157 F. 2d 13, 19 (8th Cir. 1946), the court stated, "The subcontract, however, was subject to the provisions of the original construction contract"; and the subcontractor apparently cited no language in the subcontract to refute this statement. It is most interesting to note that in all of the cases cited above, the Court of Appeals reached a decision under the Miller Act, and in at least one of these cases, an appeal from the decision of the contracting officer was in process. *United States* v. *Bruce, supra,* at page 65. Also, in two of the cases (*Morley Construction Co.* and *Ross Engineering Co.*) the circuit court ruled specifically that the intention of the parties to the subcontract was not to be bound by the decision of the contracting officer under the prime contract. Thus, far from setting up a conflict, these cases support the contractual interpretation made by the Tenth Circuit in the instant case.

Other cases where courts of appeal have proceeded in Miller Act cases in spite of pending appeals from the decision of the contracting officer, are *United States* v. *Williams*, 240 F. 2d 561 (10th Cir. 1957), and *John A. Johnson and Sons* v. *United States*, 153 F. 2d 534 (4th Cir. 1946). There thus being no conflict among the circuits whatever, Petitioners' point three must also fail.

CONCLUSION

This case, very simply, involves nothing more than an interpretation of the inter-relation of a subcontract with a prime contract on a government job. No conflicts among the circuits exist, no important questions of federal law exist and the decision of the Court below is in conformity with all applicable decisions of this Court. Not a single one of the reasons for granting certiorari listed in rule 19 of this Court even remotely exists. In spite of the efforts made by Petitioners to cloud and even ignore the sole basis for the decision of the Court below, that basis clearly was one of the interpretation of the subcontract. This is not the type of case taken by this Court. For all these reasons, and for the reasons stated in the body of this brief, the Petition should be denied.

Respectfully submitted,

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